In the Supreme Court of the United States.

OCTOBER TERM, 1903.

HIPPOLITE FILHIOL ET AL., PLAINTIFFS in error,
v.
GEORGE H. TORNEY.
No. 252.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

This is a suit in ejectment, brought by the heirs and descendants of Don Juan Filhiol, to obtain possession of "an irregular tract or plot of ground known as the site of the Army and Navy General Hospital, upon which, and within the boundaries of which, was built and is now standing the building used and occupied and known as said Army and Navy General Hospital, being the lot described on the records of the Interior Department as the site for said hospital in said (the) city of Hot Springs." It is stated that the said tract of land was included in "a league of land, being a tract of about 3 miles square, embracing all the hot springs in the city of Hot Springs, Garland County, Arkansas,"

of which the ancestor of plaintiffs was the owner and entitled to the possession at the time of his death.

This is the fourth suit brought by these plaintiffs to have determined, directly or indirectly, their right to possession of the "hot springs of Arkansas." The first was brought under the provisions of the act of June 11, 1870 (16 St. L., 149), in the Court of Claims. That suit was dismissed for want of jurisdiction; and, on appeal to this court, affirmed for want of prosecution. (*Filhiol* v. *United States*, 163 U. S., 686.) The second, *Muse* v. *Arlington Hotel Co.* (68 Fed. Rep., 637), was an action in ejectment in the circuit court of the United States for the eastern district of Arkansas. To the amended complaint therein the defendant demurred, and also filed an answer and exceptions. The circuit court sustained the demurrer and exceptions and entered judgment dismissing the complaint, whereupon a writ of error was sued out directly to this court. This writ of error was dismissed, the court holding (syllabus): A case does not involve the construction or application of the Constitution of the United States, or the validity or construction of a treaty, so that writ of error will lie directly from this court to the United States circuit court merely because the complaint in ejectment states a reliance on a certain article of a treaty and the fifth amendment of the Constitution, without asserting that any right, title, privilege, or immunity is derived from either Constitution or treaty, or indicating in what way the cause of action is claimed to arise from either, when the court does not decide any question as to the

application or construction of the Constitution or validity or construction of the treaty, but holds that plaintiffs' title failed because of non-compliance with Spanish law. (*Muse* v. *Arlington Hotel Co.*, 168 U. S., 430.)

The third suit was an action of ejectment for the recovery of a parcel of land included in the same alleged grant above referred to. It was averred in the complaint: "And for cause of action, say, that by the Fifth amendment of the Constitution of the United States and the third article of the treaty of the United States of America and the Republic of France, which was ratified on the 21st day of October, 1803, the United States undertook and agreed to maintain the said Don Juan Filhiol and his heirs in their right and title to the lands in controversy and their full enjoyment of the same, but, in violation of the provision of said treaty, and without due process of law, and in violation of the fifth amendment of the Constitution of the United States, defendants did, without condemnation and without compensation to plaintiffs, on or about the 2d day of January, 1897, wrongfully and without right, oust the plaintiffs from the possession of the land in controversy, and for more than two years last past have held possession, and they now hold possession of the land in controversy, wrongfully and without right, and they refuse to surrender possession of the same to plaintiffs." Defendants demurred on the ground that the allegations of the complaint did not constitute a cause of action. The court sustained the demurrer, dismissed the complaint, and a

writ of error directly to this court was allowed. It was here decided that the circuit court had no jurisdiction, upon the plaintiffs' statement of their claim; and the judgment was reversed and the cause remanded, with a direction to dismiss the complaint for want of jurisdiction. (*Filhiol* v. *Maurice*, 185 U. S., 108.)

In the same court, on August 14, 1902, the same plaintiffs brought this, their third suit in ejectment for a parcel of land included in the same tract claimed under this alleged Filhiol grant. The allegations of the complaint are identically the same as in the other suits, except in the statements to bring the action within the jurisdiction of the circuit court. Those allegations are as follows (Tr., 11, 12): "And for cause of action these plaintiffs say that by the third article of the treaty between the United States and the Republic of France, ratified on the 21st day of October, 1803, by which the province of Louisiana was acquired by this Government it was agreed and established that the inhabitants of said province should among other things, 'be maintained and protected in the free enjoyment of their * * * property;' that such provision, by a just construction of said treaty extended to the property of the said Don Juan Filhiol, the plaintiffs' ancestor, so, as aforesaid, granted to him, and also to the rights of these plaintiffs as his heirs in and to the same, and so far forth the qualified rights of property acquired by the United States thereunder; but that, nevertheless, denying that these plaintiffs were entitled to be maintained and protected

in such enjoyment of their said property by any construction of said treaty, the United States asserted title to said land by virtue of the general cession of the province of Louisiana, without regard to such exception in the said third article contained, and prior to the commencement of this suit did by their officers and agents, expel the plaintiffs from possession of the said land last above described, which is parcel of the aforesaid grant to their said ancestor, and did deliver over such possession to the defendant in this action some time before the commencement thereof, to wit, on the 1st day of January, A. D. 1900, and did then establish him in such possession thereof wrongfully and unjustly; that since said date, and for more than two years, the said defendant has so remained in possession of said land in controversy, claiming the same for the United States, as superintendent of the United States Army and Navy Hospital, ousting the plaintiffs and denying their right thereto, by direction of the United States, and in pursuance of the unlawful and unjust possession so given by them to him, and without any other right or claim thereto on the part of said defendant, except as such superintendent and as a public officer of the United States. And that the cause of action of these plaintiffs against the said defendant arises out of said treaty and draws in question the construction thereof."

"And also these plaintiffs say that they were by inheritance from their said ancestor lawfully possessed of the land in controversy, as parcel of said grant to

him made as aforesaid, but that the United States did heretofore deprive them of their said property without any process of law, and without any legal right so to do, and did take the same for public use without any compensation to these plaintiffs, and did as aforesaid by their officers and agents expel these plaintiffs from possession of the land in controversy, and before the commencement of this action, to wit, on the 1st day of January, A. D. 1900, established the defendant in possession thereof wrongfully and unjustly, and so he has since remained as aforesaid pursuant to such acquisition of possession by him, and by direction of the United States, and without other right or claim of right thereto, and has all said time ousted these plaintiffs. And so their cause of action arises under the Constitution of the United States and involves the application thereof for the protection of their just rights."

To this complaint defendant, by the United States attorney, demurred, stating as causes of demurrer:

First. That the court has no jurisdiction of this action.

Second. That the complainant does not state facts sufficient to constitute a cause of action. (Tr., 21.)

Subsequently, on December 31, 1902, the defendant, by the United States attorney, "duly authorized to appear herein for said defendant by Hon. H. M. Hoyt, Acting Attorney-General of the United States," filed his answer to complaint and exceptions to exhibits. (Tr., 22–31.)

And, on January 2, 1903, the defendant, by the United States attorney, "duly authorized to appear herein for said defendant by the Attorney-General of the United States," filed his amended and substituted demurrer, stating as causes of demurrer:

First. That the court has no jurisdiction over the person of the defendant.

Second. That the court has no jurisdiction over the subject-matter of the action.

Third. That the complaint does not state facts sufficient to constitute a cause of action. (Tr., 32.)

On January 12, 1903, the court rendered the following judgment (Tr., 33):

> * * * the court being now well and sufficiently advised of the matters arising on the demurrer and the substituted demurrer, argued and submitted at a previous day of this term, considers that the same be sustained:
>
> It is therefore considered, ordered, and adjudged that said demurrer to the jurisdiction of this court be and the same is hereby sustained, and that the complaint of plaintiff be dismissed.

From this judgment a writ of error was allowed directly to this court. (Tr., 38, 39.)

The only question involved in this writ of error is that of the jurisdiction of the circuit court. The judgment of the court is definite upon this point. The first seven assignments of error are based upon it, and the

eighth assignment is referable to it alone by connection with the judgment.

United States v. *Jahn*, 155 U. S., 109.

Re Lehigh Mining and Manufacturing Co., 156 U. S., 322.

Interior Construction and Improvement Co., v. *Gibney*, 160 ib., 217.

Filhiol v. *Maurice*, 185 ib., 108.

There are two grounds alleged in the complaint to support the jurisdiction of the circuit court:

First. That the cause of action arises under a treaty made under the authority of the United States.

Second. That the cause of action arises under the Constitution of the United States.

The provision of a treaty invoked is the third article of the treaty between France and the United States, which is in these terms:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess. (8 Stat., 202.)

It is alleged in this complaint in ejectment that the ancestor of the plaintiffs was entitled to the possession of these lands by virtue of a grant made by the Spanish governor of Louisiana at a time when they were

within the sovereignty of Spain. By the secret treaty of St. Ildefonso, of October 1, 1800, the province of Louisiana was ceded by Spain to France. This cession was effected in the following March, but possession was not given until November, 1803. Meanwhile, on the 30th of April, 1803, a treaty was concluded at Paris, between the First Consul of France and the commissioners of the United States, by which France ceded, forever and in full sovereignty, the province of Louisiana to the United States. This treaty was not made known until after the delivery of possession to France was enthusiastically expected and arranged for.

Salcedo, Spanish governor of the provinces of Louisiana and West Florida, and the Marquis de Casa-Calvo were joined in a commission for the delivery of the possession of the province to the commissioners of France. On the 18th of May they issued a proclamation, announcing the intention of their sovereign to surrender the province to the French Republic, and that His Majesty had determined, among other things:

> He declared his expectation, from the sincere friendship and alliance which existed between him and the French Republic, that * * * the tribunals established for the administration of justice, and ordinary judges, should be allowed to continue to administer it according to the former laws and usages of the province; the inhabitants maintained in the peaceable possession of their property, and all grants made to them by the former governors confirmed, even when not finally ratified by the King.

On the 30th of November, Laussat, commissioner of France, received possession. He immediately issued a proclamation in which he announced that the French domination was for an instant only, as he was on the eve of delivering possession to the commissioners of the United States. On the 20th of December Laussat gave to the commissioners on the part of the United States—Claiborne and Wilkinson—formal possession of the province of Louisiana. Claiborne assured the people they would be protected in the enjoyment of their liberty, property, and religion. (*Martin History Louisiana*, 289–296.)

In *Henderson* v. *Poindexter's Lessee* (12 Wh., 530, 535) Chief Justice Marshall uses this language:

> It has been very truly urged by the counsel for defendant in error, that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy, as well as of justice and humanity, is always required, and is never refused.

The declarations of the French and American commissioners were in recognition of these principles of international law. And so is the stipulation in the third article of the treaty of Paris. In *The United States* v. *Percheman*. (7 Pet., 51, 86), this court said:

> It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conquerer to do more than to displace the sovereign and assume dominion over the coun-

> try. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and *felt by the whole civilized world would be outraged*, if private property should be confiscated, and private rights annulled. * * * Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change.

In *Foster and Elam* v. *Neilson* (2 Pet., 253, 314) this court said:

> Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule of the court.

To determine the validity of grants claimed to have been made by the Spanish authorities prior to the ratification of the treaty with France Congress has provided by statutes, such as the act of May 26, 1824 (4 Stat. L., 52), "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity

of their claims." It was made lawful for any person or persons, or their legal representatives, claiming lands, tenements, or hereditaments in that part of the late province of Louisiana which is now included within the State of Missouri or the Territory of Arkansas, by virtue of any French or Spanish grant, concession, or warrant of survey, legally made, granted, or issued before the tenth day of March, one thousand eight hundred and four, by the proper authorities, to any person or persons resident in the province of Louisiana, at the date thereof, or on or before the tenth day of March, one thousand eight hundred and four, and which was protected or secured by the treaty between the United States of America and the French Republic, of the thirtieth day of April, one thousand eight hundred and three, and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty been transferred to the United States * * * such person, etc., may present a petition to the district court of the State of Missouri (or the superior court for the Territory of Arkansas), etc.

Other statutes, to the same end, have been enacted, complying with the natural obligations of the Government, whether independent of, or embodied in, treaties by which countries have been acquired. Perfect titles have remained confirmed; and inchoate or imperfect titles have been established "in conformity with the

principles of justice and according to the laws and ordinances of the government under which the claim originated."

In view of the foregoing principles, and of the expression and action of the political department, how can it be contended the allegations of this petition support a case arising under the treaty of 1803? In construing language of exception of cases from the jurisdiction of the Court of Claims, "growing out of or dependent on any treaty stipulation," this court, by Mr. Justice Lamar, said:

> In order to make the claim one arising out of a treaty within, the meaning of section 1066, Revised Statutes, the *right itself*, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation. (*United States* v. *Weld*, 127 U. S., 51, 57.)

But, indeed, as is noted within, this question appears to have been already decided in this court in relation to this very grant (*Muse* v. *The Arlington Hotel Co.*, 168 U. S., 430; *Filhiol* v. *Maurice*, 185 U. S., 108). In the former case this court, by the Chief Justice, said:

> The circuit court also held that plaintiff's title failed because of non-compliance with Spanish law. It was not pretended that the treaty, the validity of which was confessedly not in dispute, could be so construed as to compel judicial recognition of unconsummated

> claims, and it was for the circuit court to determine into what category the alleged grant fell. In doing so the construction of the treaty was not drawn in question in any manner (p. 437).

And in the second case, this court remanded the cause, with a direction to dismiss the complaint for want of jurisdiction. The court held that "no right, title, privilege, or immunity was here asserted as derived from the Constitution or the treaty, as against these private individuals who were impleaded as defendants, either specifically or through averments, that plaintiffs were ousted in violation of the treaty and of the fifth amendment, the provisions of which it was the duty of the Federal Government to observe.

To obviate the objections which were fatal to the complaint in that suit, the plaintiffs here have alleged that their ancestor and they were entitled to be maintained and protected in their enjoyment of their property by the above-mentioned stipulation of the treaty of Paris, and that the Government of the United States by their officers and agents expelled them from the possession of the land in controversy and that the defendant remained in such possession claiming the land as superintendent of the United States Army and Navy hospital, etc., which was a cause of action arising out of the treaty. It is difficult to see how those allegations, taken in in connection with the other statements of the complaint, make any different case from the one heretofore before the court. In other words, what specific right

arising from the treaty is thus shown upon which jurisdiction is given to the circuit court? Reference is made to the case of *Mitchell* v. *Furman* (180 U. S., 402); but the distinction is clearly drawn between that case and this and fully disposes of plaintiffs' contention.

There is another view of this question which we will consider together with the claim that the jurisdiction should be maintained because the case arises under the Fifth amendment to the Constitution.

This is an ordinary action in ejectment which could have been, in its present form, brought in the State court. If the allegations of the complaint had been confined to those which were necessary under the State statute, there would be no jurisdiction in the United States Court. Can a plaintiff, by the averment of facts not essential to the cause of action or which are merely assertive of a supposed defense, bring his cause within the jurisdiction? In *State of Tennessee* v. *Union and Planters' Bank* (152 U. S., 454), Mr. Justice Gray, delivering the opinion of the court, said:

> In the first and second bills, the only reference to the Constitution or laws of the United States is the suggestion that the defendants will contend that the law of the State under which the plaintiffs claim is void, because in contravention of the Constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of

> the United States, does not make the suit one arising under that Constitution or those laws (p. 464).

In *Sawyer* v. *Kochersperger* (170 U. S., 303), this court, by Mr. Justice McKenna, said:

> The case was removed into the circuit court of the United States, but improvidently, * * * notwithstanding the petition stated that defendants declined to pay on the ground that the law imposing the taxes was in violation of the Constitution of the United States.

In *Walker* v. *Collins* (167 U. S., 57) this court, by Mr. Justice White, recognizing the principle, said:

> As in the complaint in the case at bar there are no facts averred showing that the controversy was one arising under the laws of the United States, and it was not essential to the statement of the cause of action that such facts should be averred, the case comes directly within the operation of the rule cited (p. 59).

Adverting to the history of this case, is it not apparent that the whole attempt here is to make averments "for the purpose of creating a case cognizable by the circuit court, when none in fact existed?" The material allegations of the complaint are exactly the same as in the complaints in the former cases dismissed for want of jurisdiction. To create the jurisdiction the plaintiff inserted in this petition certain curative allegations that "the United States asserted title to said land by virtue of the general cession of the province of Louisiana, without regard to such exception in the said third article contained," and did expel the plaintiffs from

possession, "that the defendant has remained in possession," claiming the same for the United States "as superintendent of the United States Army and Navy Hospital," "by direction of the United States." And "that the United States did heretofore deprive them of their said property without any process of law, and without any legal right so to do, and did take the same for public use without any compensation," and that the defendant remained in possession "by direction of the United States."

That is all. The pregnant phrase, "by direction of the United States," inartistically injected into the new complaint, is complacently referred to as meeting all the defects of the former complaints pointed out by the court. I do not understand directions were at that time being given how to frame a sufficient pleading.

The present pleading, as amended, for that is what it amounts to, does not present as strong a case for jurisdiction as was in *Florida Central and Peninsular Railroad Co.*, v. *Bill* (176 U. S., 321). This court, by Mr. Justice Shiras, discussing the case, said:

> It is obvious that all that is added, by these allegations, to the plaintiffs' statement of their own claim, is a statement of what the defendant claimed before and at the time of the commencement of this suit in respect to its own title. The plaintiffs were not pretending to have title under the act of May 17, 1856, however it might be construed. That act was, under the allegations of the declaration, the source of the defendant's title, but it

> could not affect the plaintiffs' title unless it were pleaded and set up by the defendant. It has been several times held by this court that the plaintiff, if the statement of his own claim does not disclose a Federal question, can not create jurisdiction in a circuit court by anticipating the defendant's claim, and by alleging that the defendant will set up a defense under some law of the United States (p. 329).

There is no occasion to invoke the jurisdiction of a court of the United States. The courts of the State are the appropriate tribunals in which these questions should be determined, and there is no ground for reason or suspicion that in those courts full, fair, and impartial justice will not be done. If, however, from mistake or any cause, a wrong is there committed, in violation of the Constitution, or laws, or treaty made under their authority, ample redress and correction is provided by appeal to this supreme judicature. All this is apart from a matter of jurisdiction.

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